



**Republic v Deputy County Commissioner; Justus (Exparte Applicant); Kamumo (Interested Party) (Environment and Land Judicial Review Case E001 of 2023) [2024] KEELC 7131 (KLR) (30 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 7131 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT CHUKA  
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E001 OF 2023  
CK YANO, J  
OCTOBER 30, 2024**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**DEPUTY COUNTY COMMISSIONER ..... RESPONDENT**

**AND**

**NJAGI NTHENGE JUSTUS ..... EXPARTE APPLICANT**

**AND**

**NJAGI KAMUMO ..... INTERESTED PARTY**

**JUDGMENT**

1. Pursuant to leave granted by the court on 27<sup>th</sup> July, 2023, the ex-parte applicant filed the Notice of Motion dated 31<sup>st</sup> July, 2023 brought under Order 53 rule 3 of the Civil Procedure Rules seeking orders:
  - a. That an order of certiorari be granted to call to this court and quash the Respondent’s decision that allowed Appeal No. 166 of 2019 in which it purports to revoke the ex-parte applicant’s titles for parcel No. Kamwimbi “A”/121, 123, 138, 197 and 198 and the same be transferred to the interested party herein.
  - b. That the costs of this application be provided for.
2. The motion is supported by the statutory statement of facts and the verifying affidavit of Njagi Nthenge Justus, the Ex-parte Applicant dated 18<sup>th</sup> July, 2023.
3. The Respondents filed grounds of opposition dated 19<sup>th</sup> April, 2022.



4. The interested Party filed a Replying Affidavit dated 27<sup>th</sup> March, 2024 and a supplementary Affidavit dated 6<sup>th</sup> May, 2024.

### **The Applicant's Case**

5. The applicant avers that on 19<sup>th</sup> January 2023, the respondent delivered a decision in the Appeal to the Minister No. 166 of 2019. That the respondent ordered that the Applicant's title deeds and those of members of his family revoked.
6. The Applicant avers that the land parcels in dispute are part of the applicant's ancestral land that where demarcated in the name of the ex-parte applicant. That the ex-parte applicant and his family have extensively developed the land by construction of homestead thereon and have ben planting food crops, mango and avocado trees and nappier grass.
7. The Applicant avers that the interested party having gathered his own piece of land had no interest or any colour of right at all over the applicant's land. That the decision by the respondent made on 19<sup>th</sup> January, 2023 was unfounded and based on false evidence of the interested party.
8. The Applicant states that the objection leading to the decision of 19<sup>th</sup> January, 2023 was baseless, an afterthought and lodged out of the prescribed period. That the respondent arrived at the decision hereof unfairly and without due consideration and evaluation of the applicant's evidence and the appeal having been overtaken by events, the title deeds having been issued by the Land Registrar. The Applicant contends that the decision of the Respondent is illegal and unfounded since he had no jurisdiction to cancel the title deeds referred to. That the respondent exceeded his powers and his action was ultra vires.
9. The Applicant further states that at the time of the hearing of the appeal, one of the respondents, one Jospeter Njeru Njagi was already deceased, but the Minister proceeded with the hearing. That if the orders for the respondent are implemented, the applicant will suffer irreparable loss and damage as the parcels of land in dispute will be transferred to the interested party.
10. The ex-parte applicant has annexed copies of proceedings and judgment in Ministers Appeal No. 166 of 2019, receipt, title deeds and certificate of death marked "NNJ1", "NNJ2", NNJ3", and "NNJ4" respectively.

### **The Respondent's Case**

11. The respondent's grounds of opposition are on the following grounds:
  1. That the application is fatally defective, misconceived and mischievous or otherwise an abuse of the court process and therefore, are unsustainable in the obtaining circumstances.
  2. That judicial review proceedings purely deal with the procedure and process of decision making and not the merits and/or substance of the case. However, the Applicant is seeking that this Honourable Court determines the merits of the decision.
  3. That the Plaintiff's (sic) application is bad in law only meant to defeat the cause of justice hence it ought to be dismissed with costs to the Respondent.
  4. That the application is otherwise frivolous, vexatious and an abuse of the court process.



## The Interested Party's Case

12. The Interested Party deponed inter alia, that he is the legitimate owner of the suit land Kamwimbi "A" Adjudication Section. That the officers appointed under the [Land Adjudication Act](#) are mandated to and vested with jurisdiction to hear and determine all claims relating to interest in land in an adjudication area.
13. The interested party avers that there is an elaborate process under the [Land Adjudication Act](#) for identification of interest in land within the Adjudication Section. That the suit land was a subject matter of proceedings in various tribunals established under the [Land Adjudication Act](#), namely the committee, Arbitration Board, Land Adjudication Officer and Minister vide appeal to the minister case. That the appeal to the minister was decided in his favour based on evidence. That under Section 29 of the [Land Adjudication Act](#), the appeal to the minister is final.
14. The interested party states that the ex-parte applicant was given an opportunity to prosecute his objection and call for evidence but he never called out any witness. That both parties were fully accorded an opportunity to be heard before a determination was made concerning the ownership of the land in question. That the allegation by the ex-parte applicant that the proceedings before the minister were flawed with gross irregularities and unprocedural conducts is not backed up by any evidence or particulars of fact on how the decision was irregular and unprocedural.
15. The interested party states that the District Commissioner acting on behalf of the Minister has wide latitude to conduct the proceedings in a manner that meets the substantive ends of justice. That in these proceedings, the applicant has not explained how he acquired his titles when the appeal to the Minister was still pending before the panel. That the name of the applicant was registered as proprietor, subject to restriction of the pending appeal pursuant to the provisions of Section 28 of the [Land Adjudication Act](#). The interested party attached a copy of his appeal to the Minister marked NK-1.
16. The Interested party states that he has been advised by his counsel that courts have from time to time held that matters or disputes falling under Land adjudication do not strictly speaking require a party to have letters of grant so as to advance claims for and on behalf of deceased estate. That under the Land Consolidation and adjudication process, the issue before the relevant tribunal is the determination of interests in land rather than individual ownership since individual land tenure only comes into being on registration. The interested party avers that the land in question is either ancestral or falls under Communal ownership where the strict Succession legal regime does not apply since the issue of an estate may not be applicable to ancestral or communal property. That proceedings under the [Land Adjudication Act](#) do not require one to have letters of administration.
17. The interested party avers that the ex-parte applicant was heard and there is no evidence that he was denied an opportunity to call witnesses if at all he had any. That throughout the entire process, the principles of natural justice entrenched in Section 4 of the Fair Administrative Actions Act was complied with.
18. The interested party avers that the suit parcels of land have previously been subjected to clan elders (the Njuri Njeke) hearing and a court hearing. That in the case before the clan elders in 1986, it was held that the parcel of land belonged to his father Fredrick Kamumo Miiro. The interested party attached copies of the proceedings and decision together with a translated version of the proceedings marked NK-2a and 2b.



19. The interested party states that the applicant herein and Njagi Ngathuthe are one and the same person. That the applicant is also a brother to Njoka Ngathuthe who cased against his father in 1986 as evidenced by the above-mentioned clan elders' proceedings.
20. The interested party pointed out that the court case in Civil Case. No. 41 of 1972 which his brother Ephantus Njuki Kamumo was the plaintiff and Mbogo Ndabaiyu was the defendant was before the District Magistrate's Court at Chuka. The interested party attached the court proceedings marked NK-3. That the court in Civil Case No. 41 of 1972 affirmed that the interested party's family owned the said parcel of land and they were paid damages for trespass. The interested party pointed out that the parcel of land in Civil Case No. 41 of 1972 is the same parcel that is subject to these proceedings. That the Applicant Njagi Nthenge Justus Alias Njagi Ngathuthe, his brother Njoka Ngathuthe and Mbogo Ndabaiyu are of the Nyonga clan and have severally attempted to dispossess them their land.
21. The interested party states that the purported developments on the land were forcefully done during the pendency of the appeal to the Minister despite their resistance. That from the above-mentioned cases, it is evident that the parcels of land are ancestral and that they have been in occupation and utilization even before demarcation of land.
22. The interested party contended that the ex-parte applicant's averments in his verifying affidavit dwell on the merits of the minister's decision rather than the procedure to warrant review. That the ex-parte applicant has not raised any triable issues within the purview of judicial review. That the application lacks merit and should be dismissed with costs.
23. Pursuant to directions given by the court, the parties consented to disposing off the application by way of written submissions. The applicant filed his submissions on 24<sup>th</sup> May, 2024 through the firm of Kiogora Ariithi & Associates Advocates while the Interested party filed his dated 13<sup>th</sup> September, 2024 through the firm of B. Musili Advocates and the respondent filed his dated 19<sup>th</sup> September 2024 through the Honourable Attorney General.

### **Ex-parte Applicant's Submissions**

24. The ex-parte applicant gave brief facts of the case and identified the issues for determination to be whether or not the appeal decision by the respondent followed the laid out procedure in accordance with the relevant laws, whether or not the decisions by the respondent was generally illegal, irrational and procedurally improper and cost of the suit.
25. It was submitted on behalf of the applicant that the right to a fair hearing as envisioned in Article 50 of *the Constitution* 2010 is not a mere suggestion, but a fundamental right that all parties to a dispute are informed of the claim brought against them and given time to prepare and present their defence. The applicant cited Halsbury Laws of England 5<sup>th</sup> Edition 2021 Vol 61 at para 639.
26. The Applicant submitted that Section 29 (4) of the *Land Adjudication Act* allows the Minister to delegate by notice in the Gazette his powers to hear appeals and his duties and functions under the section to any public officer by name or to the person for the time being holding any public office specified in such notice and the determination, order and acts of any such public officer shall be deemed for all purposes to be that of the Minister. That it is clear that one Nkaduda M. Hiribae who was the Deputy County Commissioner Igambang'ombe South Sub-County was qualified to hear the matter and pronounced himself of a determination. It is submitted that the proceedings before him should as much as possible mimic civil suits. That the parties and their witnesses should be heard, cross-examined and documents produced in evidence. That the procedure adopted by the minister was in accordance to the minimum threshold necessary.



27. The Applicant submitted that the Respondent failed in its duty to ensure that all the Respondents to the Appeal were present or represented during trial. That one of the Respondents in the Appeal Case No. 166/2019 was Jospeter Njeru Njagi who passed away in 2014 as evidenced by Applicant's annexure "NNJ4". It was submitted on behalf of the ex-arte applicant that in such a sensitive matter, justice must not only be done, but it has to be seen to be done. That the Respondent failed as it is trite law that where a party to a suit is deceased, a legal representative must be informed to aptly represent the estate of the deceased. The Applicant relied on the case of Republic Vs. Fazul Mahamed & 3 Others Ex-parte Okiya Omtatah Okoiti [2018] eKLR.
28. It was further submitted that at the time of the Appeal to the Minister in 2022, some of the disputed parcels of land had Certificates of Title under the Land Registration Act No. 3 of 2012. For example, the Applicant was registered as the proprietor of Meru South Kamwimbi "A"/197 in 2017 as shown in the copy of the Title Deed marked "NNJ3". It was submitted that the decision by the Minister, in part, orders that "any Title Deed certificate issued is hereby revoked." That this order encompasses the rectification of the title document. The Applicant relied on the case of Republic Vs. Cabinet Secretary Ministry of Lands & Physical Planning & 3 Others ex-parte applicant: John Mbiri; Joseph Kaguura Mbugi (Interested Party) [2021] eKLR and Republic Vs. Public Procurement Administrative Review Board & 2 Others Ex-parte Rongo University/2018/eKLR. It is therefore the applicant's submission that the decision by the Minister cannot be upheld as any challenge to a registered title can only be determined by a court of law. That the Respondent's deeds are ultra vires contrary to the provisions of law which amounts to an illegality. That the respondent violated the Applicant's constitutional rights to a fair administrative action by undertaking an exercise over a matter which they had no jurisdiction.
29. Regarding the issue whether or not the decision by the respondent was generally illegal, irrational and procedurally improper, the applicant relied on the case of Municipal Council of Mombasa Vs. Republic & Another [2002]eKLR, and submitted that the proceedings are categorical that some Respondents were not heard in that they neither testified nor cross-examined. It was submitted that that goes to show that the law with regard to hearing of objection was not adhered to especially with regard to informing the family of the deceased respondent, and generally that the procedure should mimic civil suits. That this is in compliance with Section 12 of the Land Adjudication Act which also applies to the Minister. It is the applicant's submission that it is very clear the decision by the Respondent herein offends the rules of Natural Justice because one of the Respondents was deceased at time of hearing and no substitution or legal representative was present/called to respond to the allegations against the deceased.
30. The Applicant submitted that if the tests of reasonableness, fairness, legality, proportionality and fairness alluded to in the case of Republic Vs. Fazul Mahamed & 3 Others Ex-Parte Okiya Omtatah Okoiti [2018]eKLR were to be employed in this instance given the material before the minister, it was outrageous for the Minister to rule in favour of the Interested party herein. It is therefore the Applicant's submission that the Respondents decision in Appeal No. 166/2019 dated 19/1/2023 was not made in adherence to the laid down procedure provided by the relevant and applicable laws.
31. On the issue of costs, the applicant submitted that costs follow the event. He submitted that he has suffered loss and injustice on account of the Respondent's actions as he has been deprived enjoyment of his ancestral land and has also incurred costs in presenting the claim before the competent jurisdiction. That it would be in the interest of justice that he is awarded costs.



## Respondent's Submissions

32. The respondent identified two issues for determination. These are whether the impugned decision was arrived at in the manner envisaged by the law and whether judicial review remedies of certiorari and prohibition are available to the applicant.
33. The respondent pointed out that in this matter, the ex-parte applicant seeks orders of Judicial Review in the nature of Certiorari against the decision of the proceedings to the Minister Appeal No. 166 of 2019 in respect of land parcel numbers 121, 123, 138, 197 and 198 Kamwimbi "A" adjudication made vide the ruling delivered on the 19<sup>th</sup> January, 2023.
34. It was submitted that the order of Certiorari is now well established that the said order only issues if the decision being challenged was made without or in excess of jurisdiction or whether the rules of natural justice were not complied with. The respondent relied on the case of *Kenya National Examination Council Vs. Republic Ex-parte Geoffrey Gathenji & 9 Others, Nairobi Civil Appeal No. 266 of 1996* and submitted that it is necessary to examine whether the delivery of the impugned ruling by the respondent was within the authority granted to it by the *Land Adjudication Act* and observed the rules of natural justice.
35. The respondent submitted that it is not in dispute that the *Land Adjudication Act* provides for the delegation of powers by the Cabinet-Secretary in-charge of lands to hear and determine appeals. The respondent cited Section 29(4) of the said Act. That is equally not in contention that pursuant to the said provision, the norm has been that the Minister in-charge of lands would delegate his powers and functions to hear appeals to the holders of the office of the Deputy County Commissioner as seen in the case of *Republic Vs. Cabinet Secretary, Ministry of Lands and Settlement & 2 Others Ex-Parte General Mbuuri Kabugu [2018] eKLR*.
36. The respondent submitted that whereas in the instant case the ex-parte applicant alleges that the impugned decision was marred by illegality and procedural impropriety, it is their submission that the Adjudication Section that is subject of the suit underwent all the adjudication process in accordance with the provisions of the *Land Adjudication Act*. The respondent contend that the appeal process was undertaken lawfully. That the impugned decision in the appeal to the Minister's case was arrived at after due consideration of evidence tabled before the decision makers, as such it is the respondent's submission that the DCC was statutorily mandated to issue the impugned decision which was legal and procedurally proper.
37. Regarding the issue whether the rules of natural justice were observed, the respondent's counsel relied on the cases of *Republic Vs. County Director of Education, Nairobi & 4 Others Ex-Parte Abdukadir Elmi Robleh [2018] eKLR* where the court cited with approval the case of *Msagha Vs. Chief Justice & 7 Others Nairobi HCMCA No. 1062 of 2004 (Lessit, Wendo & Emukule, JJ on 3/11/06) (HCK) [2006] 2 KLR 553* in which the ingredients of natural justice were discussed. It was submitted that the impugned Ruling was compliant with the stated rules. Firstly, the respondent submitted that the ex-parte applicant was given an opportunity to participate in the appeal proceedings, secondly, that no evidence was brought by the ex-parte applicant of any interest, conduct or association of the Respondent as the primary decision maker, which would lead to a likelihood or apprehension of bias in favour of the Interested party, and finally, that the impugned decision was not based on material evidence. It was the respondent's submission that the impugned decision was indeed based on material evidence. It was noted that it referred to the testimonies issued by various participants during the Minister's appeal proceedings as well as site visit. In light of that, the respondent urged the court to find that the rules of natural justice were adhered to and as such, the ex-parte Applicant's right to fair



hearing was never controverted. They equally invite the court to find that the Respondent arrived at the impugned decision in a lawful and legal manner.

38. With regard to the issue whether the judicial review remedy of certiorari is available to the applicant, the respondent submitted that judicial review proceedings purely deal with the procedure and process of decision-making and not with merits and/or substance of the case. The respondent relied on the case of Republic Vs. Director of Immigration Services & 2 Others Ex-parte Olamilekan Gvenga Fasuyi & 2 Others (2018) eKLR. The respondent contended that the ex-parte applicant being aggrieved with the decision of the Deputy County Commissioner through these judicial review proceedings intends that the court delves into the substance of the Appeal proceedings and review the evidence. That although the application purports to call into question the process adhered to in arriving at the decision, the same is a disguised attempt to revisit the merit of the decision. The respondent submitted that all parties, including the ex-parte applicant were afforded an opportunity by the Respondent to present their respective cases.
39. The respondent submitted that owing to the serious nature of judicial review orders, it is not enough for the Ex-parte Applicant to claim that the Deputy County Commissioner acted illegally, unreasonably or in breach of rules of natural justice. That the actual sins by the impugned office must be exhibited for judicial review remedies to be granted as demonstrated in the case of Republic Vs. Kenya Power & Lighting Company Limited & Another [2013] eKLR. The respondent also relied on the case of East African Community Vs. Railways African Union (Kenya) and Others (No. 2) Civil Appeal No. 41 of 1974 [1974]EA 425 which held that the onus lies on a person seeking the grant of a prerogative order to establish that it is essential for it to issue since these are not orders that are lightly made. That judicial review or prerogative writs as they were known in the past, it has been held, are orders of serious nature and cannot and should not be granted lightly and should only be granted where there are concrete grounds for their issuance. That it is not enough to simply state that grounds for their issuance exist; there is a need to lay basis for alleging that there exist grounds which justify the grant of the said orders.
40. The respondent urged the court, in the exercise of its discretion, to find that the Ex-parte Applicant has not provided sufficient grounds to warrant an award of Judicial Review remedies of Certiorari and Prohibition. That the application does not satisfy the requisite threshold to warrant this Honourable Court's exercise of its discretion in favour of the applicant. Additionally, they urge the Court to find that the applicant's claim is a challenge on the merits of the decision of the Respondent concealed as one against the procedure adopted.
41. The respondent urged the court to find that the instant Application lacks merit and dismiss it with costs to the Respondent.

### **Interested Party's Submission**

42. The interested party identified the three issues for determination to be whether the 3<sup>rd</sup> respondent had powers to cancel title documents without a court order, whether the applicant was accorded a fair hearing and whether a dead person could own land.
43. It was submitted that the scope of Judicial Review was explained in the cases of Isaac Gathungu Wanjohi & Another Vs. Director of City Planning of Nairobi & Another (2014) eKLR and Tobias Achola Osindi and Others Vs. Cyprianus Otieno Ogalo and Others [2013]eKLR. That the court could not usurp the functions and powers of the Land Adjudication Officers or bodies set up in the Act to assist in ascertainment of rights and interest in land. The interested party submitted that jurisdiction



- of the Land Adjudication Officer is set out under Section 10 of the [Land Adjudication Act](#) which he cited and relied on the case of Dominic Musei Ikombo Vs. Kyule Makau [2019]eKLR.
44. It was the interested party's submission that the suit property was registered in the name of the Applicant and his siblings subject to determination of the appeal by the Minister and it therefore follows that a title deed could not be issued until determination of the appeal and therefore the Applicant's contention that he and his siblings were registered owners fails. The interested party relied on the case of Jambo Fondo Gona & Another Vs. Minister of Lands & Settlement & 6 Others [2012]eKLR.
  45. The interested party also submitted that it was held in Dominic Musei Ikombo Vs. Kyule Makau (2019) eKLR that a family representative during land adjudication, need not possess letters of administration. The interested party also relied on the case of Republic Vs. Minister of Lands & Another Ex-parte aKyema Muasya [2019]eKLR where the court noted that requirement for a grant had been dispensed with as individual rights in the land had not been determined and that the property did not form part of the estate of the deceased but was communal land.
  46. The interested party submitted that the [Land Adjudication Act](#) sets out several dispute resolution mechanisms. That in addressing a grievance, one starts lodging a complaint with the Land Adjudication Committee (under Section 20) and if aggrieved, a party appeals to the Arbitration Board (Section 21) and again if a party is dissatisfied, he can still pursue a further appeal with the Land Adjudication Officer (Section 26).
  47. The interested party submitted that it is common ground between the parties that due process was followed up to the time the Land Adjudication Officer rendered his decision. That upon determination by the Land Adjudication Officer, the adjudication register became final subject to appeal (Section 27 (3) (b)). That the Interested party then registered the suit property in accordance with the final adjudication register and because there was an appeal, a restriction was entered on the register of the suit property (Section 28).
  48. It is the interested party's submission that a party aggrieved by the decision of an Adjudication Officer could appeal to the Minister within 60 days from the date of determination of the appeal under Section 29. That the Minister normally makes final decisions in a manner he deems fit and his decision is final as provided in Section 29(b). That in the circumstances of this case, the Interested Party appealed against the decision of Adjudication Officer on the suit properties in Appeal Number 166 of 2019. The interested party relied on the case of Vincent Narisa Krop & 3 Others Vs. Martin Semero Limakou & 12 Others [2020] eKLR and submitted that the Court should not award the suits parcels of land to the Ex-parte applicant since it would be usurping the role of the Appeal to the Ministers-Sitting Panel and also interfering with customary rights.
  49. It is the interested party's submission that the proceedings herein related to a land falling under the provision of the [Land Consolidation Act](#) Cap 283 Laws of Kenya on to A/R objection. The interested party relied on the case of Tobias Achola Osindi and 13 Others Vs. Cyprian Otieno Ogalo and 6 Others and Lydia Kuri Silas Vs. Land Adjudication Officer Tigania District and 2 Others (2017) eKLR which held that under Section 13 of the [Land Consolidation Act](#), any person with an interest in land within an adjudication section and who was a successor of a deceased and not necessarily a legal representative could bring a claim.
  50. The interested party submitted that judicial review proceedings are sui generis. That they are neither criminal nor civil proceedings. That in line with Section 13 [Land Consolidation Act](#), a party is only required to demonstrate interest to the land. That he or she is not bound to acquire grant from court so as to advance any claim concerning an interest in land under the provision of both Cap 283 and 284.



The interested party relied on the case of JR 17/12 Kisii Antina Mohammed Hamis ex-parte applicant Vs. Suba District & Others B and M Mining Co. Ltd, applicant Minister of Environment and Mineral Resources, Commissioner for Mines and Geology JR No. 20/11 Kisumu.

51. The interested party submitted that Article 22 (1) 2(a) 3(d), 23 3(f) as read together with Article 258 of *the Constitution* provides that the court should not unduly restrict a party seeking constitutional reliefs from accessing the seat of justice. That therefore, under the circumstances obtaining in this matter he did not require letters of administration to advance his claim before this court for a decision and in proceedings in which he took part under Cap 283 and 284 Laws of Kenya. The interested party relied on the case of *Domenica Kalotia Kalalu Vs. Tigania East District Land Adjudication and Settlement Officer and Another (2019) eKLR*.
52. The interested party submitted that the record of the Appeal to the Minister proceedings indicate that John Munene and Justus Njagi Nthege were afforded an opportunity to defend their case as respondents and their witnesses Erasmus Ireri Njeru and Haron Kithaka testified. That it is part of the case background that it is captured by the decision maker that Njagi Nthege of Parcel No. 198 and Jospeter Njueru of parcel number 197 refused to attend the hearing despite several notices being given to them. That it was noted that they willingly and deliberately made a personal choice to abscond from the hearing. That the fact that the rest of the parties to the case were present is indicative that summons were issued and served and therefore they were afforded an opportunity to be heard. The interested party pointed out that it should also be noted that the family of the ex-parte applicant never made any efforts to attend the hearing until after they lost the case only for them to rush to the court seeking Sympathy. Further, that it is not the work of the Sitting panel to identify a representative of the deceased family and/or force them to attend the hearing of their case.
53. The interested party submitted that equity does not aid the indolent and that the court should be of the considered view that the Applicant has not demonstrated that he was vigilant in pursuing the case at the Appeal to the Minister level. That his indolence is inexcusable and inordinate and no explanation has been offered for non-attendance at the hearing of the case. It is the interested party's opinion that the application herein is an afterthought and is intended to delay satisfaction of Appeal to the Minister Judgment. That there should be an end to litigation so that the interested party can lawfully enjoy the fruits of his judgment. The interested party relied on the case of *Republic Vs. Land Adjudication Officer Igembe/Tigania District (2009) eKLR* and *Kisii HC Civil Case No. 4 of 2011, Tobias Achola Osindi & 13 Others Vs. Cyprianus Otieno Ogalo & 6 Others*.
54. The interested party submitted that just because the sitting panel cancelled the titles, it does not mean that the decision in itself was wrong. That the process was not flawed and that the sitting panel arrived at the correct decision bearing in mind the circumstances of the case. That in any case, if there is any unprocedural injustice occasioned upon the ex-parte applicant, then this court is vested with the necessary powers to make the necessary orders to meet the ends of justice and not usurp the powers of the Ministerial sitting panel.

### **Analysis and Determination**

55. I have considered the pleadings, the legal and statutory authorities and the written submissions filed by the parties in support of their respective assertions.



56. It is trite law that Judicial Review concerns itself with the integrity of the process rather than the merits of the decision made in the impugned proceedings. In the case of *Chief Constable of the North Wales Police Vs. Evans* [1982] 1 WLR 1155, Lord Brightman noted thus;
- “Judicial Review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power...Judicial Review, as words imply, is not an appeal from a decision but a review of the manner in which the decision was made”.
57. The principles of Judicial Review were also set out in the landmark case of *Republic Vs. Kenya National Examination Council Ex-parte Gathenji and 9 Others* [1997] eKLR where the Court of Appeal stated inter alia:
- “That an order of certiorari can only quash a decision already made and an order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction or where the rules of natural justice are not adhered to or any other reasonable cause. It is trite law that the remedy of Judicial Review is not concerned with the merits of the case, but the decision-making process. In order for an applicant to succeed in an application for Judicial Review, he must satisfy the court that a public officer has acted unprocedurally, that his decision was reasonable and that the impugned decision was illegal.”
58. In the case of *Municipal Council of Mombasa Vs. Umoja Consultants Ltd* [2002] eKLR, the Court of Appeal held that:
- “Judicial Review is concerned with the decision-making process, not with the merits of the decision itself; the court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself, such as whether there was or there was not sufficient evidence to support the decision.”
59. The issues for determination are whether the respondent acting pursuant to the delegated powers given to him by the Minister under the *Land Adjudication Act* had jurisdiction to order for cancellation of registered land and whether the judicial review remedy is available to the applicant.
60. In this case, the ex-parte applicant seeks orders of judicial review in the nature of Certiorari against the decision of the respondent in proceedings to the Minister Appeal No. 166 of 2019 in respect of land parcel Numbers 121, 123, 138, 197 and 198 Kamwimbi “A” Adjudication Section made on 19<sup>th</sup> January, 2023.
61. From their submissions, it is clear that all the parties are in agreement that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision-making process itself. The purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected to. It is not part of that purpose to substitute the opinion of the court for that of the authority constituted by law to decide the matter in question. That restriction by the court is to ensure that it does not usurp the power of the decision-maker or act as a Court of Appeal over the decision. However, the decision-maker must keep in mind that their decisions must be made within the confines of the law that regulates



them. If they fail to follow the law properly, their decision, action or failure to act will be illegal. Thus, an action or decision may be illegal on the basis that the public body had no power to take that action or decision or has acted beyond its powers. See the case of Republic Vs. Fazul Mahamed & 3 Others Ex-parte Okiya Omtatah Okoiti (Supra).

62. In this case, the applicant submits that at the time of the appeal to the Minister in 2022, some of the disputed parcels of land had certificates of title under the *Land Registration Act* No. 3 of 2012. One such parcel is Meru South Kamwimbi “A”/197 which was registered in the name of the Ex-pate applicant in the year 2017. On the other hand, the interested party submitted that the suit property was registered in the name of the applicant and his siblings subject to determination of the appeal by the Minister. That it therefore follows that a title deed could not be issued until the determination of the said appeal. It follows therefore, that there is no dispute that some of the suit properties were already registered in the names of the applicant and others as at the time the respondent made the impugned decision. Indeed, the respondent ordered that “any title deed certificate (sic) issued is hereby revoked.”
63. The impugned decision was made on 19<sup>th</sup> January, 2023 in Appeal Case No. 166 of 2019 over parcel Nos. 121-123, 138, 197 and 198, Kamwimbi “A” Adjudication Section. The respondent not only ruled that the said parcels of land be registered under the name of the interested party herein, but also ordered that any title deed issued be revoked. The question that arises is whether the respondent acting pursuant to the delegated powers given to him by the Minister under the *Land Adjudication Act* or the *Land Consolidation Act* had jurisdiction to order for the revocation or cancellation of registered land that was issued in the year 2017. The evidence on record indicates that Title Number Meru South/Kamwimbi “A”/197 was issued to the applicant herein on 7<sup>th</sup> July, 2017. The appeal to the Minister is Case No. 166 of 2019, implying that it was filed in the year 2019.
64. Pursuant to Section 26 of the *Land Registration Act*, 2012, protection of title can be removed and the title impeached if it is procured through fraud or misrepresentation to which the person is proved to be a party, or where it is procured illegally, unprocedurally, or through a corrupt scheme. The import of this provision is to remove protection from an innocent purchaser or innocent title holder. The statute has provided clarity on the exercise of jurisdiction by the courts in matters concerning cancellation or revocation of title. Section 80 of the *Land Registration Act* provides for the rectification of the register by order of court. Section 9 of the Magistrates’ Court Act provides inter alia that the court may deal with claims related to Land and Environment in the exercise of the jurisdiction conferred upon it by Section 26 of the *Environment and Land Court Act* subject to the pecuniary limits under Section 7(1). Therefore, it is clear from these provisions of law that the court may order the rectification of the register of land by directing any registration to be cancelled or amended if it is satisfied that any such registration was obtained, made or omitted by fraud or mistake and the register will not be rectified to affect the title of a property unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.
65. Section 2 of the *Land Registration Act* defines the court to mean the Environment and Land Court and other courts having jurisdiction to hear and determine environment and land matters. In my view, the courts referred to under that section only includes other courts with jurisdiction on matters relating to land, which includes the magistrates’ court and this court. In my humble view, the jurisdiction referred to did not extend to public bodies or authorities such as the respondent herein who was only acting within the powers conferred to him under the *Land Adjudication Act* and the *Land Consolidation Act*. Therefore, it is clear that the respondent had no power to make a decision that amounts to an order for rectification of the register and/or cancellation of a title. It is my finding that the respondent acted without jurisdiction hence his action is ultra vires and amounts to an illegality when he ruled



that “any title deed issued is hereby revoked.” It is my view that, that decision was made contrary to the clear provisions of the law. This is because the respondent’s powers and functions are limited to those under Cap 283 and 284 Laws of Kenya, which are basically ascertainment of individual rights. By purporting to revoke the ex-parte applicant’s title, and indeed any other title over the suit properties, the respondent no doubt acted in excess of power and without jurisdiction. The respondent exceeded his power and his decision must be quashed.

66. Consequently, I find that the Notice of Motion dated 31<sup>st</sup> July, 2023 is merited and the same is allowed as prayed. The Ex-parte applicant will have the costs of these proceedings.

67. It is so ordered.

**DATED, SIGNED AND DELIVERED AT CHUKA THIS 30<sup>TH</sup> OCTOBER, 2024**

**In the presence of:**

Court Assistant – Kiruja

Ms. Mugo for Applicant

Ms. Kendi for Respondent

Ms. Musili for Interested Party

**C.K YANO,**

**JUDGE**

